



Notes of Melendez-Diaz Meeting

Holy Cross January 7, 2010

Attending:

- ADAs Joe Yorlano (Berkshire), Paul Machado (Bristol), Sharon Thibeault (C&I), Ken Bresler & Jana DiNatale (Essex), Tricia Gould & Marian Ryan (Middlesex), Jeanmarie Carroll, Tom Finigan & Bob Nelson (Norfolk), Neil Desroches (Northwestern), Gerry Stewart & Christina Miller (Suffolk), Donna-Marie Haran (Worcester)
- EOPSS: Undersecretary John Grossman, Counsel Greg Massing, Lt. Col. Frank Matthews, Heather Hall, SP legal; Det. Cptn. Tom Kerle & Barbara O'Brien (OAT); Det. Lt. Michael Coleman & Sgt. Dave Cahill (FID)
- Labs: SPCL: Mjr. Jim Connolly, Kenny Gagnon, Al Eliau, Melissa O'Meara, Monika Bewtra & Nancy Burns (QA); UMass Worcester: Ellen Selin & Gina Nano (QA); DPH: Julianne Nassif & Grace Connolly
- MDAA: Geline Williams, Kim Aliprantis, Andrea Nardone

M-D Impact on Labs:

- Testing TAT: DPH Amherst, about 30 days; DPH Boston, about 200 days; SPCL: about 30 days; UMass Worcester about 40 days.
- Number of subpoenas: SPCL had zero for drugs last year, 365 this year; DPH had a handful last year, 914 so far this year.

What happens when chemist appears for trial:

- Often def pleads; if trial and chemist testifies, def conducts minimal, inconsequential XM.

Four major recommendations for expediting cases by reducing load on the labs:

First: Summons only one chemist.

- Prosecutors are routinely summoning two chemists, especially from DPH, without first determining that two chemists are in fact necessary for the proof of their case. (This practice apparently is due to the fact that the DPH certificate identifies two chemists at the top of the form; DPH will try to correct this.)

Second: Routinely move to call a substitute expert.

- Prosecutors need to aggressively file motions for substitute expert testimony, and try to get this issue before the SJC. If substitutes were routinely allowed, the labs could assign experts to cover specific courts and regions, thus greatly reducing the burden on bench chemists. Once defense counsel realize that the Commonwealth will in fact produce a chemist at trial, the overall demand should start to drop. See sample motions and affidavits for substitute testimony on MDAAnet under *Melendez-Diaz*.

Third: OAT issue – proffer the *Agonis* ruling.

- *Melendez-Diaz* is having a very significant impact on OUI cases, as defendants are claiming that the BT results are not admissible unless the Commonwealth produce an expert from OAT (the SP Office of Alcohol Testing) to testify to the certification of the BT machines. The OAT BT certification is an annual process that is required by law and regulation.
- In November 2009, in *Commonwealth v. Agonis*, Fitchburg DCT Presiding Judge Andrew Mandell consolidated 47 pending OUI cases where motions to produce OAT testimony on the certification process were pending. Mandell heard extensive testimony and wrote a 14-page opinion finding that OAT's certification did not contain testimonial evidence and thus M-D was inapplicable, and that the certification was admissible under the business record exception to the hearsay rule. When proffered by prosecutors to a judge, the *Agonis* ruling has been extremely successful in defeating the OAT-witness issue. MDAA is securing a clean copy of this decision to post on MDAAnet and will have copies for Judge Connolly at next week's DA meeting.
- Captain Kerle pleaded with the prosecutors at Holy Cross to aggressively fight these motions to produce OAT witnesses, as OAT does not have the resources to respond to these subpoenas.

Fourth: Immediately notify the labs when cases are closed.

- It is important that the labs not waste their limited resources by testing evidence in cases that, unbeknownst to them, have been closed. This is true of all kinds of evidence in every kind of case, but is especially true of drugs because of the *Melendez-Diaz* issue. The best solution would be an automatic electronic notice to all labs holding evidence at the time the case is closed out in DAMION. However, that solution is not on the immediate horizon, primarily because (1) there is no common number to track the case and (2) many DA offices have significant lags between when a case is over and when it is closed out of DAMION. In the meanwhile, immediate solutions include Suffolk's practice of sending the labs a fax, notifying them that a case is closed. The labs have provided a standard notification form and ask that, if at all possible, the lab case numbers be included in the fax (or e-mail) to them.

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